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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. JAVIER MARQUEZ, Defendant and Appellant.	B193733 (Los Angeles County Super. Ct. No. BA217941)

APPEAL from a judgment of the Superior Court of Los Angeles County. Larry Paul Fidler, Judge. Affirmed with modifications.

Edward J. Haggerty, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Victoria B. Wilson and Corey J. Robins, Deputy Attorneys General, for Plaintiff and Respondent.

Javier Medina Marquez appeals from the judgment entered following a jury trial that resulted in his conviction of first degree murder (Pen. Code §187, subd. (a); counts 2 & 7)[1] and true special circumstance findings of witness murder (§190.2, subd. (a)(10)) and multiple murder (§190.2, subd. (a)(3). (CT 553-570, 651, 704, 707, 809-811, 908) He was sentenced to prison for life without possibility of parole on both murder convictions and ordered to pay a §20 court security fee.

Appellant contends his conviction for the murder of Allan Downey (count 2) should be overturned, because under *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), his constitutional guarantee of due process and right of confrontation (U.S. Const., 6th & 14th Amends.) were violated by admission of the prejudicial hearsay statement that appellant was the getaway driver. He contends *Crawford* also mandates his conviction for the murder of Randy Morales (count 7) be vacated for admission of the prejudicial hearsay statement that appellant had ordered Morales murdered and Morales' unduly prejudicial statement to police that appellant said he had shot five Highland Park gang members and Morales heard appellant killed the Sanchez brothers.

Appellant contends exclusion of Richie Aguirre's statement denying participation in the Downey murder also violated appellant's right of confrontation. He contends his conviction for Morales' murder must be set aside, because it was based on uncorroborated accomplice testimony of Witness No. 1 and George Vidales.

Appellant also contends the judgment must be reversed, because the trial court erroneously admitted other inadmissible hearsay, namely People's Exhibit 9,

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[1] All further section references are to the Penal Code unless otherwise indicated.

an organizational chart for the Mexican Mafia, and People's Exhibit 12, a "green light list," in violation of appellant's right of confrontation. He contends his right to confrontation and his guarantee of due process were violated when the trial court denied his request for a continuance to secure a material witness.

He assigns the following as reversible instructional error: (1) There was inadequate instruction on the limited admissibility of Morales' statement about appellant's involvement in the murders of the Sanchez brothers; (2) The trial court failed to include Witness No. 1 in the accomplice testimony instruction; (3) CALCRIM 220 misled the jury to believe it was foreclosed from considering the lack of evidence, and thus, lightened the People's burden of proof to prove guilt beyond a reasonable doubt; (4) CALCRIM 226, as given, impermissibly directed the jury to "use [its] common sense and experience" and thereby invited the jury to find guilt based on a standard less than the requisite "beyond a reasonable doubt"; (5) The court failed to instruct jurors on the need to agree unanimously on whether the murder was first or second degree (CALCRIM 640) and whether appellant was guilty of the greater rather than lesser crime (CALCRIM 641); and (6) CALCRIM 315, as modified, improperly directed the jury to determine whether other evidence exists that corroborated the eyewitness identification of appellant.

Appellant further contends imposition of the $20 court security fee violated the constitutional prohibition against ex post facto laws (U.S. Const., art. I, §10; Cal. Const., art. I, §9) and that the cumulative effect of the assigned errors warrants reversal of the judgment. He requests this court conduct an in camera review of a sealed transcript to determine whether the trial court erred in denying his discovery motion (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531) and two other sealed transcripts regarding county jail materials to determine whether that court erred in finding they were not germane to his subpoena.

By letter, we invited the parties to address whether the trial court committed unauthorized sentencing error in imposing a single $20 court security

fee and if so, whether the fee should have been imposed for each conviction and the aggregate fee amount. We have received their responses.

Based on our review of the record and applicable law, we modify the judgment to reflect imposition of a $20 court security fee on each of appellant's two convictions for a total fee amount of $40.00. In all other respects, we affirm the judgment.

BACKGROUND

A short summary suffices where, as here, the sufficiency of the evidence to support the judgment is not challenged. We view the evidence in the light most favorable to the People and presume the existence of every fact the trier could reasonably deduce from the evidence that supports the judgment. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

This evidence established the shooting deaths of Morales and Downey were gang-related. At the behest of appellant, a member of the Avenues and Mexican Mafia gangs, Gerado Reyes, a fellow gang member, murdered Morales, because Morales had snitched to police about appellant killing Sergio and Herman Sanchez, who were brothers and members of the rival Highland Park gang. Although Richie, also an Avenues and Mexican Mafia gang member, was the shooter in the murder of Downey for his failure to pay the Mexican Mafia gang drug sale "taxes," appellant was the getaway driver.

1. *Murder of Morales*

During an interview, Morales, an Avenues gang member, told police that appellant said he shot five "Jalepenos," meaning Highland Park gang members, and that Morales heard appellant shot "Yogi" and "Wicked," the respective gang monikers of Sergio and Herman.

On August 25, 1995, appellant was in custody for the Sanchez murders. At some point, the prosecutor turned over to appellant's counsel a police murder investigation book, which contained a summary of Morales' interview. In the

summer of 1996, the prosecutor inferred Morales' name had not been completely redacted, because counsel abruptly stopped asking him for information about the witness whose name had been redacted.

Morales was murdered before trial was held on the Sanchez murder charges, and on July 22, 1998, appellant was acquitted of those charges.

The murder of Morales occurred on October 5, 1996, around 11:00 p.m. The cause of death was six gunshot wounds to his head fired between a half inch to three feet away.

At trial, Vidales, a member of the Avenues gang and a Mexican Mafia gang associate, testified about the circumstances surrounding Morales' murder.[2] Around 9:00 p.m., Vidales was at a party attended by many Avenues gang members, including Reyes, and Vince Caldera. Caldera told Vidales he wanted his help and related the message from appellant, who was in county jail, that Morales was a "rat" regarding murder charges appellant was fighting and appellant wanted Morales killed before he could testify. Reyes said, "I told [appellant] I will take care of it for him." Death was the "green light" sanction for a "rat," i.e., someone who gave information to the police about a crime or suspect.

The plan was for Vidales to give Reyes the gun Vidales borrowed from Morales, who wanted it back, and then Reyes would kill Morales after he, Caldera, and Vidales tricked Morales into driving to a more private location under pretense of retrieving Morales' gun.

When Morales arrived at the party, Vidales told him that Reyes and Caldera would drive with them to Vidales's house in El Serreno to get Morales' gun. At a secluded spot before reaching that destination, Vidales stopped the van, explaining

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[2] Pursuant to a plea bargain, if Vidales testified truthfully and completely, the second degree murder charge to which he had pled guilty would be reduced to manslaughter, and the prosecutor would recommend a six-year prison term. He also was granted immunity except for the Morales murder.

he had to urinate. Morales, Reyes, and Caldera also exited.[3] While Vidales relieved himself, Morales crouched next to the van's bumper as if tying his shoe or fixing his pants. With gun drawn, Reyes walked up and shot Morales in the head multiple times. Caldera, who stood behind Reyes, held his own gun as if "making sure the job got done." (RT 2082-2089, 2093-2096)

2. *Murder of Downey*

The Mexican Mafia gang, sometimes referred to as the "gang of gangs," controlled the distribution of drugs in the prison and jail systems. Its principal revenue sources were drug dealing through street gangs and the robbing and taxing of drug dealers. The Mexican Mafia would direct street gangs to tax drug dealers who would send a portion of their drug proceeds to the Mexican Mafia members in charge of the area where the drugs were sold.

Downey sold drugs and collected taxes for Alex Aguirre, an upper echelon Mexican Mafia gang member who took over drug dealing in Avenues territory. Richie, an Avenues gang member, was Alex's younger brother and a "shot caller" for the Mexican Mafia members in the Avenues. Appellant, a member of both the Avenues and Mexican Mafia gangs, also was a "shot caller." A "shot caller" enforced the rules of the Mexican Mafia but could not order someone killed. A killing required authorization from someone above. A drug dealer who did not pay the imposed taxes would be severely beaten or killed.

Downey "was supposed to collect money, but all the money was staying with him." Shortly before his murder, Downey related to Witness No. 6 that someone had given him the message he had to start paying taxes. Downey then said, "F**k that. I don't pay rent to anybody."

On August 14, 1995, during the dark early morning hours, someone fired a

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[3] Caldera talked Marvin Ponce, also an Avenues gang member into accompanying them. Ponce remained in the van when the others exited.

gun through the open window of Downey's Camry as he drove along Eagle Rock Boulevard near Verdugo. While driving home, Witness No. 9, came upon the apparent accident scene. After checking on the Camry's unmoving occupant, Witness No. 9 called 911 from a pay phone across the street. While he was on hold, a vehicle approached slowly from the other direction against traffic, and a small gun from the driver's side rear passenger window appeared to point at Witness No. 9, who hung up and waited for police down the street. Witness No. 9 later positively identified appellant as the driver from a photo lineup.

Downey, who was in the Camry's driver's seat, died from three gunshot wounds to the left side of his head. Sometime after the murder, Richie told Witness No. 1 to tell appellant he should "stop crying" about the Downey murder, because it was he, Richie, who shot Downey and appellant "just drove the car." Richie explained Downey was killed for not paying taxes on the drugs he sold and not buying his drugs from Alex.

Appellant, who did not testify, essentially relied on a mistaken identity defense for the Downey murder and presented witnesses to challenge the credibility of prosecution witnesses on the Morales murder charge.

DISCUSSION

1. *Getaway Driver Statement Not Crawford or Prejudicial Error*

Appellant contends his conviction for Downey's murder cannot stand, because his guarantee of due process and right of confrontation were violated under *Crawford* by admission of that portion of Richie's hearsay statement that appellant "just drove the car," which was prejudicial in that it implicated him as the getaway driver. We conclude admission of Richie's statement was not violative of the Confrontation Clause nor prejudical hearsay.

At trial, defense counsel moved to suppress Witness No. 1's statement that Richie said appellant "just drove the car" on the ground Richie would be unavailable for cross-examination.

The trial court ruled Richie's statement was admissible. The court found the statement was not testimonial, and thus, *Crawford* did not preclude its admission. (*Crawford, supra*, 541 U.S. 36, 59, 68-69 [Confrontation Clause bars admission of testimonial out-of-court statements against criminal defendant unless prior opportunity to cross-examine declarant unavailable at trial].) The court also found the statement was admissible as a declaration against interest, an exception to the rule against admission of hearsay, because in making this statement Richie was inculpating himself in a conspiracy with appellant to kill Downey. The court explained: "The statement is a classic declaration against interest that involves more than one party." Although finding Witness No. 1, to whom Richie made the statement, was reliable, the court indicated it would give a cautionary instruction about Witness No. 1 as an immunized witness.

Witness No. 1 testified Richie directed him to tell appellant to "stop crying" about the Downey murder, because Richie, not appellant, shot and killed Downey and appellant "just drove the car."

Hearsay is an out-of-court statement offered for the truth of the matter asserted. (Evid. Code §1200, subd. (a).) The challenged statement qualifies as hearsay, because its relevancy depends on its truth. "Except as provided by law, hearsay evidence is inadmissible." (Evid. Code §1200, subd. (b).)

Ohio v. Roberts (1980) 448 U.S. 56 "condition[ed] the admissibility of all hearsay evidence on whether it falls under a 'firmly rooted hearsay exception' *or* bears 'particularized guarantees of trustworthiness.' [Citation.]" (*Crawford, supra*, 541 U.S. at p. 60, italics added.) *Crawford* overruled *Roberts* only to the extent *Roberts* allowed admission of *testimonial* hearsay. *Crawford* did not bar admission of *nontestimonial* hearsay if the statement satisfied either of *Robert's* above two prongs. (*Crawford, supra,* 541 U.S. 36 at pp. 60-61, 68-69.)

Initially, we conclude the subject statement, albeit hearsay, is not "testimonial" under *Crawford*. Although the *Crawford* court did not explicitly

define "testimonial," the court gave various exemplars, such as "[s]tatements taken by police officers in the course of interrogations" and "*ex parte* testimony at a preliminary hearing." Significantly, the court explained: "An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." (*Crawford, supra,* 541 U.S. 36 at pp. 51-52; see also, *People v. Griffin* (2004) 33 Cal.4th 536, 579-580 [statement not testimonial where made to friend at school.)

In *Davis v. Washington* (2006) 547 U.S. 813, the United States Supreme Court "clarifie[d] the distinction between testimonial and nontestimonial hearsay." (*People v. Cage* (2007) 40 Cal.4th 965.) The *Davis* court "has made clear that *Roberts, supra,* 448 U.S. 56, and its progeny are overruled for all purposes, and retain no relevance to a determination whether a particular hearsay statement is admissible under the confrontation clause. As the court indicated in *Davis,* '[i]t is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, *is not subject to the Confrontation Clause.*' (*Davis* [*v. Washington* (2006) 547 U.S. 813, 821], 126 S.Ct. 2266, 2273, italics added.) Thus, there is no basis for an inference that, even if a hearsay statement is nontestimonial, it must nonetheless undergo a *Roberts* analysis before it may be admitted under the Constitution." (*People v. Cage, supra,* 40 Cal.4th at p. 981, fn 10.)

In short, *Davis* clarifies the Confrontation Clause only pertains to testimonial hearsay. Accordingly, we conclude the admissibility of nontestimonial hearsay in California is solely a matter of state law governing hearsay, its exceptions, and exclusions. The corollary to this conclusion is: The erroneous admission of nontestimonial hearsay only implicates the violation of state law.

We further conclude the impact and consequences of the erroneous admission nontestimonial hearsay therefore must be evaluated and measured under the state standard applicable to evidentiary errors not of federal constitutional

dimension. "Whether this error resulted in a miscarriage of justice, a prerequisite for reversal (Cal. Const., art. VI, § 13) … is [the] question. The standard of review of error not implicating constitutional rights in criminal cases is whether it is reasonably probable that a result more favorable to defendant would have occurred in the absence of the error. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)" (*People v. Burgener* (1986) 41 Cal.3d 505, 528 [erroneous admission of blood screening test evidence]; see also, *People v. Samuels* (2005) 36 Cal.4th 96, 114 ["'generally, violations of state evidentiary rules do not rise to the level of federal constitutional error'"] (*Samuels*).)

Mindful of these principles, we find the portion of Richie's statement that appellant "just drove the car" falls within the declaration against interest exception to the inadmissible hearsay rule and that its admission in any event was nonprejudicial, because a result more favorable to appellant in its absence was not reasonably probable.

In this context, the declaration against interest exception requires "the statement, when made, was . . . so far subjected him to the risk of . . . criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true." (Evid. Code §1230.)[4] "The proponent of such evidence must show . . . the declaration was against the declarant's penal

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[4] In its entirety, Evidence Code section 1230 provides: "Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true."

It was anticipated that Richie would invoke his privilege against self-incrimination (U.S. Const., 5th Amend.) and not testify, which in fact transpired.

interest when made, and that the declaration was sufficiently reliable to warrant admission despite its hearsay character." (*People v. Duarte* (2000) 24 Cal.4th 603, 610-611.)

A statement that incriminates both the declarant and a nondeclarant may be specifically disserving to the declarant's penal interest. (*People v. Greenberger* (1997) 58 Cal.App.4th 298, 335(*Greenberger*).) The pivotal issue is whether the declarant's statement "so far subject[ed] him to the risk of criminal liability that a reasonable person in his position would not have made it unless he believed it to be true." (*People v. Gordon* (1990) 50 Cal.3d 1223, 1253 (*Gordon*).) "Such a determination necessarily depends upon a careful analysis of what was said and the totality of the circumstances. [Citations.]" (*Greenberger*, *supra,* at p. 335.)

"[T]he heart of the exception is the basic trustworthiness of the declaration, and that question is entrusted to the trial court's discretion. It follows that a determination whether the declaration is indeed against interest should itself be reviewed for abuse of discretion . . . ." (*Gordon*, *supra*, 50 Cal.3d at 1252.) Abuse occurs only where "the court exceeds the bounds of reason, all of the circumstances being considered." (*People v. Giminez* (1975) 14 Cal.3d 68, 72.)

There was no abuse. The portion of the statement about appellant being just the driver was not untrustworthy. It was not made under custodial conditions or to law enforcement. Rather, it was made to a fellow gang member in a non-coercive environs. Richie's motive for speaking was to boast about his involvement in the gang-related murder in order to enhance his gang status. Additionally, Richie fully admitted primary culpability for Downey's murder; he did not attempt to shift blame to appellant or diminish his role at appellant's expense; and in fact, he emphasized appellant's relatively minor role as simply the getaway driver. (See, e.g. *Samuels*, *supra,* 36 Cal.4th 96, 120-121 [facially incriminating comments volunteered to acquaintance "in no way exculpatory, self-serving or collateral"; rather, "reference [to defendant] was inextricably tied to and

part of a specific statement against penal interest"]; Cf. *People v. Duarte*, *supra*, 24 Cal.4th 603 at pp. 612, 613 [statement both inculpatory and exculpatory in part not "specifically disserving to Morris" where his statement actually "tended sympathetically to describe Morris's participation in the shooting of the [victim's] residence, to minimize his responsibility for the injuries caused thereby and to imply that others who were or might become implicated should bear a greater share of the responsibility"].)

Moreover, the challenged hearsay statement was less probative and merely duplicative of other evidence. If Ritchie's statement that appellant had just driven the car were excluded, ample evidence supports the jury's implied findings that: Downey was driving his car when another car pulled alongside and someone within fired multiple shots into Downey's car, three of which struck and killed Downey. There is also the impressive evidence of the passerby eyewitness. Shortly after the shooting, the witness came across what he thought was an accident scene and checked on the unmoving Downey in his crashed car. While the witness was on hold for 911, a vehicle approached slowly from the opposite direction and a partially concealed handgun peered out from a rear window and appeared to point in his direction. Later, he picked appellant out of a photo display as the driver of this vehicle.

His identification of appellant was corroborated by evidence appellant was a member of the Mexican Mafia, which had put out a "green light" on Downey for failing to pay it taxes, and the shooting had earmarks of a Mexican Mafia kill, i.e., "overkill."

2. *Other Admitted Statements Not Error or Crawford Violation*

Appellant contends *Crawford* mandates his conviction for the Morales murder be vacated for admission of the prejudicial hearsay statements: (1) appellant had ordered Morales murdered and (2) Morales' statement to police that appellant said he had shot five Highland Park gang members and Morales heard

appellant killed the Sanchez brothers. There was no *Crawford* violation or other error.

a. *Appellant's Statement to Caldera About Morales' Murder*

Defense counsel interposed a hearsay objection to Vidales testifying that Caldera said appellant had ordered Morales murdered. The trial court overruled the objection, finding "clearly there is prima facie evidence of a conspiracy."

Appellant acknowledges the statement was admissible for this reason but argues its admission was barred under *Crawford* as testimony hearsay. The challenged statement is not testimonial within the meaning of *Crawford*, nor was it not made to law enforcement or under circumstances giving rise to an inference it was obtained for its potential role in determining whether a criminal charge should issue or in a criminal court proceeding. (See, e.g., *Crawford*, *supra*, 541 U.S. 36, 51-52; *People v. Taulton* (2005) 129 Cal.App.4th 1218, 1224.) Rather, the statement was made by a gang member to a fellow gang member co-conspirator in furtherance of the conspiracy to kill Morales. (Cf. *Samuels*, *supra*, 36 Cal.4th 96, 121 [hearsay exception for statements made in furtherance of a murder conspiracy not implicated where statements made after murder].)

b. Morales' *Statement to Police Implicating Appellant*

Appellant contends the trial court committed reversible error by allowing evidence of Morales' statement to police that appellant said he shot five Highland Park gang members and Morales heard appellant killed the Sanchez brothers. He argues such statement violated *Crawford* and as unduly prejudicial. His contention is unsuccessful.

At trial, defense counsel moved to exclude Morales' statement as testimonial hearsay under *Crawford* and because it was prejudicial. The trial court denied the motion. The court found the statement was offered to show the motive for Morales' murder rather than for its truth, and thus it was not hearsay. The

court further found its probative value outweighed any prejudice.[5]

We find the reasoning of the trial court persuasive. "'Hearsay evidence' is evidence . . . that is offered to prove the truth of the matter stated." (Evid. Code §1200, subd. (a).) This was not the purpose of the statement. Rather, the statement was offered to show Morales' murder was motivated by appellant's desire to silence Morales before he could testify at appellant's trial for killing the Sanchez brothers and for the additional reason that, as a "rat," Morales was marked for death by appellant's gang.

The probative value of this statement therefore was high. In contrast, the prejudicial impact of its admission was minimal in that it would not serve to inflame the jury against appellant, create a danger of undue consumption of time or confusion of the issues, or inject into trial extraneous matters. (See, e.g., *People v. Jenkins* (2000) 22 Cal.4th 900, 1008.) The trial court therefore did not abuse its discretion in admitting the statement as more probative than prejudicial. (Evid. Code §352.)

3. *Exclusion of Richie's Statement Not Confrontation Violation*

Appellant contends exclusion of Richie's statement denying participation in the Downey murder violated appellant's right of confrontation. We find no constitutional infirmity.

During trial, defense counsel indicated his desire to call Detective Cid to testify: (1) Richie denied he shot Downey; and (2) Richie explained he may have left fingerprints on Downey's car "a few days" before Downey's murder. The trial court tentatively found that portion of Richie's statement about the fingerprints was not admissible as a prior inconsistent statement absent a foundational showing

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5 The court added it would, and in fact did, admonish the jury that the statement was admissible only to show motive and "not for the truth asserted, meaning whether or not he actually did it.

under section 770 of the Evidence Code. The court explained this was not its final ruling; rather, it was "simply telling [counsel] that there is a problem with that." Nothing further transpired regarding this matter.

We initially find appellant has forfeited his claim of error by failing to obtain a final ruling on the admissibility of Richie's alleged statement to Cid denying he shot Downey. Absent such ruling, there is nothing before us to review. (See, e.g., *People v. Rowland* (1992) 4 Cal.4th 238, 259; see also *People v. Fudge* (1994) 7 Cal.4th 1075, 1097 (*Fudge*).)

On the merits, we conclude exclusion of the statement would not have been error. "Evidence of a statement or other conduct by a declarant that is inconsistent with a statement by such declarant received in evidence as hearsay evidence is not inadmissible for the purpose of attacking the credibility of the declarant . . . ." (Evid. Code, §1202.) This was not the purpose to be served by admission of the subject statement.

Appellant sought to admit the statement for the truth of the matter asserted, namely, Richie did not shoot Downey, in order to refute Witness No. 1's testimony that Richie admitted shooting Downey and stated appellant "just drove the car." A prior inconsistent hearsay statement is admissible for its substance and impeachment only if the declarant testifies and is subject to cross-examination. (*People v. Zapien* (1993) 4 Cal.4th 929, 955; see also, Evid. Code §§770, 1235; see e.g. *People v. Marquez* (1979) 88 Cal.App.3d 993, 997-998 [preliminary hearing favorable defense testimony not admissible where witness refused to testify at trial].)

It was anticipated that Richie would not, and in fact, he did not testify at this trial. The trial court thus would have been acting well within its discretion in excluding evidence of the subject statement. (See, e.g., *People v. Jablonski* (2006) 37 Cal.4th 774, 821.)

4. *Accomplice Testimony Sufficiently Corroborated*

Appellant contends his conviction for Morales' murder must be set aside, because it was based on uncorroborated accomplice testimony from Witness No. 1 and Vidales. We disagree.

a. *Witness No. 1 Not Accomplice*

Appellant's claim of error as to Witness No. 1 is grounded in his unsupportable premise Witness No. 1 was an accomplice to Morales' murder. He was not.

"'"[W]here, as a matter of law, the witness is not an accomplice, the court does not err in refusing to charge that he is or in refusing to submit the issue to the jury."' [Citations.]" (*People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1159 (*Verlinde*).)

"Accomplice liability is '"derivative,'" resulting from an act by the perpetrator to which the accomplice contributed. [Citation.] Put another way, '"[a]n accomplice" is one who knowingly, voluntarily, and with common intent with the principal offender unites in the commission of the crime.' [Citation.]" (*Verlinde*, *supra*, 100 Cal.App.4th 1146 at p. 1158.)

"'In order to be an accomplice, the witness must be chargeable with the crime as a principal (§ 31) and not merely as an accessory after the fact (§§ 32, 33).' [Citation.] Aiders and abettors are included in the category of principals. (§ 31.) An aider and abettor is one who aids, promotes, encourages or instigates a crime with knowledge of the unlawful purpose of the perpetrator *and* the intent to assist in the commission of the crime. [Citation.] Since aider and abettor liability is based on principles of vicarious liability, an aider and abettor is liable not only for the offense he intended to facilitate or encourage but also for 'any reasonably foreseeable offense committed as a consequence by the perpetrator.' [Citation.]" (*Verlinde*, *supra*, 100 Cal.App.4th 1146 at p. 1158.)

The uncontroverted evidence establishes Witness No. 1 did not participate

in the murder of Morales, nor was he subject to prosecution therefor. At trial, Witness No. 1, an Avenues and Mexican Mafia gang member, testified that on that eventful night, he was driving when he noticed Reyes driving a van and Morales and Vidales were inside. The two vehicles stopped. Vidales exited, approached Witness No. 1's car, and related Reyes wanted to "check" Morales. Witness No. 1 responded Morales was close to and worked for "Little Richie" and stated they could "check" Morales, namely inflict a non-lethal discipline, such as a beating or stabbing, but they should "hold off" and not kill Morales until Little Richie approved of such action.

Vidales testified he did not tell Witness No. 1 they were going to kill Morales. Rather, he simply said they were going to "check" Morales because he was a rat and there was "paperwork," e.g., police report, court transcript, etc. on Morales. Witness No. 1 did not approve and told Vidales he should "stay away from that" because of Moarles' close connection to Little Richie, who might become upset.

What can be gleaned from this evidence is Witness No. 1 had no foreknowledge of any plan to kill Morales that night; he was adamantly opposed to any such killing at that point; and he specifically admonished Vidales against such killing. Additionaly, no evidence was presented from which an inference could be drawn that Witness No. 1 in any way aided and abetted or otherwise participated in Morales' murder. Witness No. 1. thus was not an accomplice, and no corroboration of his testimony therefore was required.[6]

b. *Vidales' Testimony Amply Corroborated*

In contrast to Witness No. 1, Vidales was an accomplice in Morales' murder. Contrary to appellant's claim, the testimony of Vidales was amply

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[6] Appellant concedes Witness No. 1 was not an accomplice in Downey's murder.

corroborated.

"A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." (§1111.)

"The corroborating evidence may be circumstantial or slight and entitled to little consideration when standing alone, so long as it tends to implicate the defendant by relating to an act that is an element of the crime. [Citations.] The independent evidence need not corroborate the accomplice as to every fact on which the accomplice testifies [citation] and need not establish every element of the charged offense [citation]." (*People v. Vu* (2006) 143 Cal.App.4th 1009, 1022 (*Vu*).)

Corroboration is adequate if, without reference to the accomplice testimony, the evidence "'"'tends to connect the defendant with the commission of the offense in such a way as reasonably may satisfy a jury that the accomplice is telling the truth.'"' [Citations.]" (*Vu*, *supra*, 143 Cal.App.4th 1009, 1022.) Sufficient corroboration exists where independent evidence demonstrates defendant had a motive to commit the crime. (See *People v. Szeto* (1981) 28 [conviction for accessory to felon where defendant disposed of guns after murder upheld where independent evidence demonstrated motive (revenge on rival gang member) and opportunity]; *Vu*, *supra*, at p.1022-1023, [motive and opportunity in gang-related murder].)

Ample corroborating evidence of appellant's involvement in Morales' murder was presented. Through Vidales' testimony, the jury was informed Morales's murder was ordered by appellant, because Morales was a "rat" who was cooperating with the police regarding other murder charges against appellant and appellant wanted Morales killed before he could testify in that case.

This testimony about appellant's motive for the murder of Morales was

corroborated by evidence of: (1) "paperwork" on Morale's role as a "rat," which "paperwork was a prerequisite for imposing the Mexican Mafia's usual sanction for a "rat," i.e., death; (2) appellant's access to such "paperwork," i.e., the prosecutor turned it over to the defense in that other murder case; and (3) the manner of Morales' murder was consistent with a Mexican Mafia hit under these facts, namely, luring the unsuspecting victim by someone he trusted to a secluded spot, striking when his defenses were down, and "overkill." Also, the gang expert opined Morale's murder was consistent with a Mexican Mafia killing.

5. *Mexican Mafia Chart and Green Light List Properly Admitted*

Appellant also contends the judgment must be reversed, because the trial court erroneously admitted inadmissible hearsay, namely People's Exhibit 9, an organizational chart for the Mexican Mafia, and People's Exhibit 12, a "green light list," in violation of appellant's right of confrontation. Admission of these items was not error or abuse.

a. *Admission of Mexican Mafia Chart Not Improper*

Appellant's contention that People's Exhibit 9 was inadmissible hearsay and that its admission therefore violated his right to confrontation is unsuccessful.

The defense conceded the People could use the chart in argument without its admission in evidence, which would mitigate some of the chart's prejudicial impact, but objected to admission of People's Exhibit 9 on the grounds the chart was hearsay, its maker unknown, and it was misleading. The People argued the chart's contents already had been the subject of testimony by five witnesses.

The court ruled the chart was admissible. The court found the chart was simply a visual representation of witness testimony and that its value was significantly probative in that the chart served to solidify diverse testimony from various witnesses into a single document. The court noted counsel was entitled to attack the method of preparation and the chart's accuracy and found the probative value of the chart outweighed any potential prejudicial impact from its admission.

We find the reasoning of the trial court persuasive. Our Supreme Court has approved of and upheld the use of such visual aids. In *People v. Fauber* (1992) 2 Cal.4th 792, the court rejected an inadmissible hearsay claim regarding the prosecutor's use of a poster during opening argument. The court explained: "[U]se of the poster neither violated the rule against hearsay nor constituted any species of vouching. The purpose of the opening statement '"is to prepare the minds of the jury to follow the evidence and to more readily discern its materiality, force and effect" [citation]. . . . ' [Citation.] The use of photographs and tape recordings, intended later to be admitted in evidence, as visual or auditory aids is appropriate." (*Id*. at p. 827.) Appellant was afforded the opportunity to attack the manner in which the chart was prepared and the accuracy of its contents, and he does not contend the opportunity was inadequate.

b. *Admission of Green Light List Not Improper*

Appellant contends People's Exhibit No. 12, a green light list on which Witness No. 4's name appeared, was inadmissible hearsay and its admission was prejudicial as to the count 2 Downey murder charge, because Witness No. 4 testified regarding that murder. We disagree.

Defense counsel made a hearsay objection to admission of Exhibit No. 12 and argued "we don't know who printed it or made it or anything else." The prosecutor responded that a deputy would testify he found it a county jail inmate's cell and the list was relevant, because Witness No. 4, whose name was on the list, would be testifying. The trial court overruled the objection and subsequently admitted it into evidence.

Admission of the Exhibit No. 12 document as resembling a "green light" list was not improper. The exhibit was admissible as probative of the motive for the murders, particularly Downey's. (See *People v. Kraft* (2000) 23 Cal.4th 978, 1034 [within trial court's sound discretion to conclude murder victim list relevant where "[i]t had a tendency in reason to prove a disputed fact of consequence to the

case"].) Moreover, this exhibit was not hearsay, because it was not admitted for the truth of the matter stated (Evid. Code, §1200, subd. (a)), namely, the Mexican Mafia had given the "green light," or "OK," for Witness No. 4, or anyone else named in the document, to be disciplined or killed.

At trial, evidence was presented to explain the term "[g]reen light" signified a particular individual or gang had been chosen by the Mexican Mafia for discipline, which might range from a non-lethal stabbing or beating to death. Death was the "green light" sanction if a gang member, such as Morales, were labeled a "rat." If a drug dealer, such as Downey, failed to pay the taxes imposed, the discipline was a severe beating or death. Written permission in the nature of a such a "hit list" was a prerequisite for a Mexican Mafia ordered killing.

Los Angeles County Sheriff's deputy Kirk Cardella testified on February 2, 2000, he retrieved Exhibit No. 12 from an inmate's cell in the gang module. He opined Exhibit No. 12 resembled a "green-light" list.

Witness No. 4, a Mexican Mafia associate, testified he had his own territory and conducted drug business for the Mexican Mafia on an exclusive basis. He sold drugs to Downey. A few weeks before Downey's murder, Richie approached Witness No. 4 and told him to kill Downey. Witness No. 4 refused. He thought one reason why Richie wanted Downey killed was Downey's failure to pay taxes. Witness No. 4 was "green lighted" for refusing to kill Downey. His name was on the Exhibit 9 "green light" document.

Additionally, admission of Exhibit No. 12 did not prejudice appellant. Contrary to his claim, there was no evidence linking him to the list. No evidence was presented that appellant or anyone else disciplined or attempted to discipline Witness No. 4 based on that list. In light of the overwhelming evidence of appellant's guilt, admission of Exhibit No. 12 did not result in the requisite manifest miscarriage of justice mandating reversal of the judgment. (See, e.g., *People v. Ochoa* (2001) 26 Cal.4th 398, 437-438 [exercise of discretion on

admissibility of evidence not ground for reversal unless exercise of discretion arbitrary, capricious or in patently absurd manner resulting in manifest miscarriage of justice]; *People v. Reed* (1996) 13 Cal.4th 217, 230-231 [erroneous admission of hearsay evidence nonprejudicial].)

6. *Denial of Continuance Not Abuse of Discretion*

Appellant contends his right to confrontation and his guarantee of due process were violated when the trial court denied his request for a continuance to secure a material witness, Jacob Pulido. Denial of the continuance was no abuse.

Prior to completion of the People's case-in-chief, defense counsel requested a continuance of about a month to secure the presence of Pulido. He argued during an interview "some years back," Pulido told police "Rich Uribe" "confessed to him" shortly after the murder that Uribe drove while an unidentified person in the rear of the vehicle shot Downey. Counsel argued Uribe's statement to Pulido was admissible, because in a police interview, Uribe denied making the statement and Uribe's subsequent death rendered him unavailable as a witness.

Counsel stated the defense had been looking for Pulido for the past several months and only located him two weeks earlier when Pulido posted something on the Internet while in an Arizona prison. He added, it was a "very complicated process" costing about $5,000 and involving time and use of the legal process.

In denying the request without prejudice, the trial court invited counsel "to present something else . . . ." The court explained counsel's factual showing was "way too hypothetical" and he had presented "nothing about the circumstances of the supposed, if it is indeed a declaration against interest, certainly at the time it was made, that it was trustworthy or what the circumstances are."

"We review a ruling on a motion for a continuance for an abuse of discretion. [Citations.] In order to show the court abused its discretion in denying a continuance in the midst of trial, the defendant must demonstrate, among other things, that he diligently attempted to secure the attendance of witnesses.

[Citation.]" (*People v. Lewis* (2006) 39 Cal.4th 970, 1036.) Also, the trial court "'. . . must consider not only the benefit which the moving party anticipates but also the likelihood that such benefit will result, the burden on other witnesses, jurors and the court and, above all, whether substantial justice will be accomplished or defeated by a granting of the motion. In the lack of a showing of an abuse of discretion or of prejudice to the defendant, a denial of his motion for a continuance cannot result in a reversal of a judgment of conviction. [Citation.]' [Citations.]" (*People v. Zapien*, *supra*, 4 Cal.4th at p. 972.)

The trial court did not abuse its discretion in denying a lengthy continuance in the midst of trial. Defense counsel made a speculative showing that the appearance of a witness whom the defense only started looking for only in "the past several months" and who was not under subpoena, *might* be secured by then. Counsel also did not attempt to justify his failure to seek the witness earlier by explaining how, in the exercise of due diligence, that witness could not have been located. Additionally, he did not offer any reasonable assurance the witness would be able to testify regarding the circumstances of Uribe's statement or that Uribe in fact made this statement.

Moreover, appellant did not in fact take up the trial court's offer to allow him to make a further and adequate showing for the requested continuance. (See, e.g., *People v. Zapien*, *supra*, 4 Cal.4th at p. 972 ["Defendant has not cited any portion of the record establishing that he ever renewed his request," which renewal the trial court had invited].)

7. *Instruction on Limited Admissibility of Statement Adequate*

Appellant challenges the sufficiency of the instruction on the limited admissibility of Morales' statement about appellant's involvement in the murders of the Sanchez brothers. The instruction was correct as given, and thus, adequate. To the extent appellant desired additional instruction, it was incumbent on him to request and proffer such instruction. His failure to do so forfeits his claim of error.

"Although the court must instruct the jury on the general principles of law applicable to a case, this obligation does not extend to instructions limiting the purposes for which particular evidence may be considered. [Citation.] Moreover, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate amplifying, clarifying, or limiting language. (*People v. Sully* (1991) 53 Cal.3d 1195, 1218; see, e.g., *People v. Hawkins* (1995) 10 Cal.4th 920, 942 [no sua sponte duty limit jury's consideration of other crimes evidence to specific charge]; *People v. Freeman* (1994) 8 Cal.4th 450, 495 [no duty to limit other crimes evidence to issue of impeachment]; *People v. Andrews* (1989) 49 Cal.3d 200, 218 [no duty to modify instruction re: accomplice testimony]; *People v. Gutierrez* (1993) 14 Cal.App.4th 1425, 1439 [no sua sponte duty to modify flight instruction]; *People v. Prysock* (1982) 127 Cal.App.3d 972, 1002-1003 [same].)" (*People v. Farley* (1996) 45 Cal.App.4th 1697, 1711; cf. *People v. Hudson* (2006) 38 Cal.4th 1002, 1011-1012 [no forfeiture where "trial court gives an instruction that is an incorrect statement of the law"].)

During trial, evidence was presented regarding Morales' police interview statement that appellant said he shot five "Jalepenos," meaning Highland Park gang members and Morales heard appellant shot Yogi and Wicked, the Sanchez brothers.

At this juncture, the trial court admonished the jury that this evidence was "not received for the truth of the matter asserted, meaning whether or not [appellant] did it. It was solely admitted for the purpose of showing a possible motive for the events that are here in this case. That's the sole purpose [why] it's admitted." (RT 1569-1570)

The trial court later gave CALCRIM 303 "Limited Purpose Evidence in General[,]" which instructed the jury: "During the trial, certain evidence was admitted for a limited purpose. You may consider that evidence only for that

purpose and for no other." (CT 766, RT 2916)

This instruction of the jury was correct. (See *People v. McDermott* (2002) 28 Cal.4th 946, 999 [other crimes evidence generally admissible to show motive and there, the "trial court limited its prejudicial impact by instructing the jury that the evidence was not admissible to prove bad character or predisposition to commit crimes"].) Appellant did not request any modification nor proffer any limiting, clarifying, or amplifying instruction. Accordingly, he has forfeited any claim of error based on the omission of any further instruction on this subject.

8. *No Accomplice Instruction as to Witness No. 1 Warranted*

Appellant contends the trial court erred by failing to include Witness No. 1 in the accomplice testimony instruction. There was no error.

"A witness's status as an accomplice 'is a question for the jury if there is a genuine evidentiary dispute [on knowledge and intent] and if "the jury could reasonably [find] from the evidence" that the witness is an accomplice.' [Citations.] In such cases, the defendant is entitled to instructions on accomplice testimony, and the failure to instruct may be reversible error. [Citation.]" (*Verlinde*, *supra*, 100 Cal.App.4th at pp. 1158-1159, fn. omitted..) "There is a sua sponte duty to give accomplice testimony instructions. [Citation.]" (*Id*. at p. 1157.)

In contrast, where "the facts are not in dispute, the issue is a legal one to be determined by the trial court. [Citation.] '"Where such witness is an accomplice as a matter of law, the court should so charge. . . . Conversely, where, as a matter of law, the witness is not an accomplice, the court does not err in refusing to charge that he is or in refusing to submit the issue to the jury."' [Citations.]" (*Verlinde*, *supra*, 100 Cal.App.4th at p. 1159.)

"'For instructional purposes, an accomplice is a person "who is liable to prosecution for the *identical offense* charged against the defendant on trial in the cause in which the testimony of the accomplice is given." [Citations.]'

[Citations.] 'In order to be an accomplice, the witness must be chargeable with the crime as a principal [citation] and not merely as an accessory after the fact [citations]. [Citation.]' [Citation.] Principals include those who 'directly commit the act constituting the offense' as well as those who 'aid and abet in its commission. . . . .' [Citation.]" (*People v. Felton* (2004) 122 Cal.App.4th 260, 268.)

During an instruction discussion, defense counsel requested the court declare Witness No. 1 "a coconspirator in the case in that . . . he joins the conspiracy actually after it happens, and he keeps what he knows to himself and thereby become a conspirator." He added in such case, his testimony would have to be corroborated, because "[o]ne conspirator [can]not . . . corroborate another."[7]

The court denied the request and explained: "There is absolutely nothing, I mean no evidence whatsoever that shows except for knowledge of what was going to happen and not taking any steps to prevent it, which. . . . the instruction tells you . . . does not make one a coconspirator, does not make one an accomplice, does not make one an aider and abettor. That's the sole state of the evidence. There is no evidence of the contrary."

As discussed above, Witness No.1 was not an accomplice. Instruction regarding Witness No. 1 as an accomplice therefore was properly omitted.

9. *CALCRIM 220 Not Lessen Reasonable Doubt Burden*

Appellant contends the language in CALCRIM 220 instructing the jury to "compare and consider all the evidence that was received throughout the entire trial" misled the jury to believe it was foreclosed from considering the lack of

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[7] In his opening brief, appellant mistakenly stated defense counsel "specifically requested that Witness No. 1 be listed as an accomplice in the accomplice instructions to be given to the jury." During discussion of the accomplice instruction, defense counsel did not mention Witness No. 1 when the court asked for "[a]nybody else" that needed to be added.

evidence thereby lightened the People's burden to prove guilt beyond a reasonable doubt. We disagree.

Initially, we point out the quoted language from CALCRIM 220 is in all essentials identical to similar language in CALJIC No. 2.90, an earlier instruction that the United States Supreme Court upheld against a related challenge.

In *People v. Rios* (2007) 151 Cal.App.4th 1154 (*Rios*) (rev. den.), the defendant argued the "language in CALCRIM 220 absent from analogous CALJIC No. 2.90 requiring the jury 'to compare and consider all the evidence' impermissibly shifts the burden of proof to the defense by allowing the jury to hold against the defense the absence of defense evidence." (*Id*. at p. 1156.)

The *Rios* court did not agree and explained: "CALCRIM 220 uses *verbs* requiring the jury 'compare and consider all the evidence that was received throughout the entire trial.' CALJIC No. 2.90 uses *nouns* requiring 'the entire comparison and consideration of all the evidence' by the jury. Ríos fails to persuade us that those grammatical differences are material. The United States Supreme Court rejected a constitutional challenge to CALJIC No. 2.90 in part on the rationale that 'the entire comparison and consideration of all the evidence' language 'explicitly told the jurors that their conclusion had to be based on the evidence in the case.' (*Victor v. Nebraska* (1994) 511 U.S. 1, 16.) The language Ríos challenges in CALCRIM 220 did just that. The standard of review in an appellate challenge to an instruction on the ground of ambiguity is whether there is a reasonable likelihood that the jury applied the instruction in a way that denied fundamental fairness. [Citations.] By that standard, Ríos's argument that 'CALCRIM 220 shifted the burden to him to prove the existence of reasonable doubt' is meritless." (*People* v. *Rios*, *supra*, 151 Cal.App.4th at p. 1157.)

We note another appellate court has rejected a contention almost identical to appellant's. In *People v. Westbrooks* (2007) 151 Cal.App.4th 1500 (*Westbrooks*) (rev. den.), the defendant argued CALCRIM 220 "improperly

'limited the jury's determination of reasonable doubt to the evidence *received* at trial and precluded it from considering the lack of physical evidence tying [him] to the offense.'" (*Id*. at pp. 1505-1506, italics original.) Defendant "place[d] particular emphasis on the following sentence in CALCRIM No. 220, 'In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial.' He note[d] that CALCRIM No. 222 generally defines evidence as the testimony and exhibits offered at trial." (*Id*. at p. 1509.)

In finding defendant's construction of that sentence unpersuasive, the *Westbrooks* court reasoned: "The sentence to which [he] objects, like the remainder of CALCRIM No. 220, merely instructs the jury that it must consider only the evidence presented at trial in determining whether the People have met their burden of proof. In other words, this instruction informs the jury that the People may not meet their burden of proof based on evidence other than that offered at trial. *The instruction does not tell the jury that it may not consider any perceived lack of evidence in determining whether there is a reasonable doubt as to a defendant's guilt.* Further, the remainder of the instructions clearly conveyed to the jury the notion that the People had the burden of proving [defendant]'s guilt beyond a reasonable doubt and that the jury was required to determine whether the People had met their burden of proving all of the facts essential to establishing his guilt." (*Westbrooks , supra*, 151 Cal.App.4th at p. 1509, italics added; see *id*. p. 1508 ["Reasonable doubt may arise from the evidence presented at trial or the 'lack of evidence[]'"]; cf. *People v. McCullough* (1979) 100 Cal.App.3d 169, 181-182 [where juror asked if "the doubt must arise from evidence," trial court misled jury with its affirmative response].)

A substantially similar challenge to CALCRIM 220 was raised and rejected in *People v. Guerrero* (2007) 155 Cal.App.4th 1264 (*Guerrero*) (rev.den.). The defendant claimed "this instruction prevented the jury from considering a lack of

evidence in deciding whether reasonable doubt existed. In support . . . , [he] focuse[d] on the phrase 'the evidence that was received throughout the entire trial.' Defendant argues his due process rights are violated by an instruction defining reasonable doubt 'unless the concept of lack of evidence is included in the basic definition of reasonable doubt,' thus rendering the instruction facially invalid." (*Id*. at p. 1267.)

The *Guerrero* court acknowledged: "The 'Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt.' (*In re Winship* (1970) 397 U.S. 358, 364.) An instruction which misstates the prosecution's burden to prove every element of the crime beyond a reasonable doubt violates due process. (*Victor v. Nebraska* (1994) 511 U.S. 1, 5(*Victor*).)" (*Id*. at pp. 1267-1268.)

The court pointed out *Victor* announced this principle for assessing whether the language of a reasonable doubt instruction passed constitutional muster: "'The beyond a reasonable doubt standard is a requirement of due process, but the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course. [Citation.] Indeed, so long as the court instructs the jury on the necessity that the defendant's guilt be proved beyond a reasonable doubt [citation], the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof. [Citation.] Rather, "taken as a whole, the instructions [must] correctly convey the concept of reasonable doubt to the jury."' [Citation.] (*Victor, supra,* 511 U.S. at p. 5.)" (*Guerrero, supra*, 155 Cal.App.4th at p. 1268, italics original.)

The *Guerrero* court concluded, "[c]ontrary to defendant's suggestion, CALCRIM No. 220 instructs the jury to acquit in the absence of evidence. In addressing defendant's claim, we consider whether a 'reasonable juror would apply the instruction in the manner suggested by defendant.' [Citation.] The jury is instructed to consider only the evidence, and to acquit unless the evidence

proves defendant's guilt beyond a reasonable doubt. If the government presents no evidence, then proof beyond a reasonable doubt is lacking, and a reasonable juror applying this instruction would acquit the defendant. [¶] Due process requires nothing more. CALCRIM No. 220 does not violate due process." (*Guerrero*, *supra*, 155 Cal.App.4th at pp. 1268-1269.)

Mindful of the standard enunciated in *Victor* for assessing the constitutional conformity of a particular reasonable doubt instruction, we conclude CALCRIM 220's directive that the jury is to "compare and consider all the evidence that was received throughout the entire trial" does not affect in any way the People's burden to prove a defendant's guilt beyond a reasonable doubt. The directive that the jury is to consider "all the evidence" does not foreclose the jury from taking into account the absence of evidence. Rather, its import is this: In determining whether the People have carried their burden to prove guilt beyond a reasonable doubt, the jury may not ignore any evidence presented at trial.

We therefore hold CALCRIM 220 does not violate the Due Process by foreclosing the jury from considering the absence of evidence and thereby lessen the People's burden to prove a defendant's guilt beyond a reasonable doubt. CALCRIM 220's directive that the jury is to "compare and consider all the evidence that was received throughout the entire trial" simply instructs the jury not to ignore any evidence presented at trial and in no way directs the jury to ignore the absence of evidence.

10. *CALCRIM 226 Not Lesson Reasonable Doubt Burden*

Appellant contends CALCRIM 226, as given, impermissibly directed the jury to "use [its] common sense and experience" and thereby invited the jury to find guilt based on subjective factors that resulted in a standard less than the requisite "beyond a reasonable doubt." We disagree.

In pertinent part, as given, CALCRIM 226 instructed: "You alone, must judge the credibility or believability of the witnesses. In deciding whether

testimony is true and accurate, *use your common sense and experience*. The testimony of each witness must be judged by the same standard. You must set aside any bias or prejudice you may have, including any based on the witness's disability, gender, race, religion, ethnicity, sexual orientation, gender identity, age, national origin, or any other reason." (Italics added.)

We conclude CALCRIM 226's directive to the jury to "use your common sense and experience" in assessing the credibility or believability of witnesses is consistent with the inherent role of jurors in considering evidence that does not necessitate an expert. As our Supreme Court explained: "Jurors' views of the evidence . . . are *necessarily* informed by their life experiences, including their education and professional work." [Citations.]" (*People v. Yeoman* (2003) 31 Cal.4th 93, 161, italics added.)

Trial by jury is an inviolate right under the state and federal constitutions. (U.S. Const. 6th Amend.; Cal. Const., art. 1, §16.) This right is intended to guarantee "*[i]f the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he -was to have it*." (*Duncan v. Louisiana* (1968) 391 U.S. 145, 156, italics added.)

"Jurors cannot be expected to shed their backgrounds and experiences at the door of the deliberation room." (*People v. Fauber*, *supra*, 2 Cal.4th at p. 839.) On the contrary, they are "*expected to* bring their individual backgrounds and experiences to bear on the deliberative process." (*People v. Pride* (1992) 3 Cal.4th 195, 268, italics added.) "Jurors [thus] bring to . . . deliberations knowledge and beliefs about general matters of law and fact that find their source in everyday life and experience." (*People v. Marshall* (1990) 50 Cal.3d 907, 950.)

Jurors' own common sense and experience are not available to evaluate evidence requiring technical expertise, such as DNA evidence. (See, e.g., *People v. Venegas* (1998) 18 Cal.4th 47, 80.) Nonetheless, in "most other instances, the jurors are permitted to rely on their own common sense and good judgment in

evaluating the weight of the evidence presented to them."[8] (*Ibid*.)

We therefore hold that instructing the jury pursuant to CALCRIM 226 to employ their "common sense and experience" to consider a witness's credibility or believability, which are ordinary matters generally within the province of the jury as the trier of fact to resolve, does not lessen the People's burden to prove guilt beyond a reasonable doubt.

11. *Omission of CALCRIM 640 and 641 Not Error*

Appellant contends the trial court erred by failing sua sponte to instruct jurors on the need to agree unanimously on whether the murder was first or second degree (CALCRIM 640) and whether appellant was guilty of the greater rather than lesser crime (CALCRIM 641). His contention is unsuccessful.

The giving of either CALCRIM 640 or 641 would have been error, because such instruction was unsupported by the evidence, which revealed appellant was guilty of first degree murder or not guilty. "It is error to give an instruction which, while correctly stating a principle of law, has no application to the facts of the case. [Citation.]" (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129.)

In *Stone v. Superior Court* (1982) 31 Cal.3d 503, our Supreme Court held that "the trial court is constitutionally obligated to afford the jury an opportunity to render a partial verdict of acquittal on a greater offense when the jury is

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[8] "[O]rdinarily jurors are equipped to examine crime scene photographs and autopsy evidence and to form an opinion, in the context of their own perception of the evidence in the particular case, whether the wounds depicted are so similar they suggest the wounds were inflicted by the same person. [¶] Notwithstanding the ability of jurors to review the evidence before them and draw commonsense inferences, it may aid them to learn from a person with extensive training in crime scene analysis, who has examined not only the evidence in the particular case but has in mind his or her experience in analyzing hundreds of other cases, whether certain features that appear in all the charged crimes are comparatively rare, and therefore suggest in the expert's opinion that the crimes were committed by the same person." (*People v. Prince* (2007) 40 Cal.4th 1179, 1222-1223, fn. omitted.)

deadlocked only on an uncharged lesser included offense. Failure to do so will cause a subsequently declared mistrial to be without legal necessity.

"To guide the trial courts of this state in fulfilling the obligations which this rule entails, [the court] suggest[ed the following] procedures derived by analogy from the multiple count situation [citations]. (Fn. omitted.)

"When a trial judge has instructed a jury on a charged offense and on an uncharged lesser included offense, one appropriate course of action would be to provide the jury with forms for a verdict of guilty or not guilty as to each offense. The jury must be cautioned, of course, that it should first decide whether the defendant is guilty of the greater offense before considering the lesser offense, and that if it finds the defendant guilty of the greater offense, or if it is unable to agree on that offense, it should not return a verdict on the lesser offense.

"Alternatively, the court may decide to wait and see whether the jury is unable to reach a verdict; if it is, the court should then inquire whether the jury has been able to eliminate any offense. If the jury declares itself hopelessly deadlocked on the lesser offense yet unanimous for acquittal on the greater offense, and the court is satisfied that the jury is not merely expressing a tentative vote but has completed its deliberations, the court must formally accept a partial verdict on the greater offense. It is within the discretion of the court to order further deliberations if it perceives a reasonable probability that a verdict will be reached that will dispose of the entire proceeding." (*Stone v. Superior Court*, *supra*, 31 Cal.3d at pp. 519-520.)

CALCRIM 640 and 641, respectively, are the instructions adopted to carry out these two alternative directives. (See Bench Notes to CALCRIM 640 and 641.)

The prosecutor requested the trial court give CALCRIM No. 640 to guide the jury in filling out the verdict forms. The court declined, explaining the instruction was not warranted, because there was no basis for instructing on "any

lessers in this case." Defense counsel made no comment. CALCRIM No. 641 was not addressed.

"It is well established that the trial court has a sua sponte duty to instruct the jury on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present and there is evidence that would justify a conviction of such a lesser offense. [Citations.] Second degree murder is a lesser included offense of first degree murder. [Citation.] Nonetheless, even when the law imposes upon the trial court a sua sponte duty to instruct the jury, as it does with regard to lesser included offenses, that duty is not triggered '"when there is no evidence that the offense was less than that charged." [Citation.]' [Citation.]" (*People v. Bradford* (1997) 15 Cal.4th 1229, 1344-1345.)

Appellant ordered Morales killed for revenge, i.e, he informed on appellant to the police, and to prevent him from testifying against appellant. The unsuspecting Morales was lured to his death at a secluded spot by his fellow gang members through the ruse of going to retrieve Morales's gun, and when Morales' defenses were down, one shot him at close range multiple times. Morales died from six fatal gunshot wounds to his head. Downey's murder also was a gang-related shooting. He refused to pay the Mexican Mafia taxes on the he drugs sold. Death was a sanction for failure to obey this edict. Multiple shots were fired from a car appellant was driving at Downey, who was the driver and sole occupant of his car. Richie, appellant's fellow gang member, admitted he shot Downey. (Cf. *People v. Bradford*, *supra*, 15 Cal.4th at p. 1345 [second degree murder instruction warranted based on evidence that "manner of killing, ligature strangulation," did not foreclose "defendant might not have premeditated or deliberated before killing the victims"].)

The evidence presented thus established appellant was guilty of first degree murder or not guilty of any homicide. No evidence was presented that these

killings occurred without premeditation or deliberation, the earmarks of first degree murder.[9] Accordingly, the giving of CALCRIM 640 or 641 on how to fill out verdicts on lesser included offenses would have been error. (See, e.g., (*People v. Guiton*, *supra*, 4 Cal.4th at p. 1129; *People v. Saddler* (1979) 24 Cal.3d 671, 681 [trial court under duty to refrain from instructing on principles of law not only irrelevant to issues raised by evidence but whose effect is to confuse the jury on relevant issues].)

12. *Modified CALCRIM 315 Not Improper Instruction*

Appellant contends CALCRIM 315, as modified, improperly directed the jury to determine whether other evidence exists that corroborated the witness identification of appellant, the effect of which was to favor the prosecution with an argumentative, one-sided instruction. We disagree.

At trial, Witness No. 9 identified appellant as the driver of the car from whose driver's side rear passenger window Witness No. 9 observed a gun being pointed in his direction.

During the discussion on instructions, the prosecutor requested the court add this factor to CALCRIM No. 315, the eyewitness instruction: "Whether there exists other evidence in the case which corroborates the witness's identification of the defendant." Defense counsel responded: "Well, there is only one difference. Witness No. 9 is talking about a time when - Well, I can't even argue that. No, I

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[9] The first degree murder charge here was prosecuted solely on the theory of willful, premeditated, and deliberate murder. Premeditation and deliberation are not elements of first-degree murder based on a felony-murder theory. (Cf. *People v. Waidla* (2000) 22 Cal.4th 690, 739-740 [substantial evidence "of first degree murder on a theory of willful, premeditated, and deliberate murder" and "of first degree murder on theories of felony-murder burglary and felony-murder robbery"].)

don't have anything further." The trial court later gave CALCRIM No. 315 as augmented with the factor requested by the prosecutor, along with two others requested by defense counsel.

The record thus reflects appellant failed to object that the prosecutor's factor resulted in an argumentative, one-sided instruction in his favor. Appellant therefore has failed to preserve his claim of error for review. (See, e.g., *Fudge, supra*, 7 Cal.4th at p. 1108; *People v. Rivera* (1984) 162 Cal.App.3d 141, 146.) Similarly, to the extent appellant may be understood also to be complaining the giving of this instruction communicated to the jury bias on the part of the trial court, he has forfeited any claim of judicial misconduct or impropriety by filing to object and request an admonition below. (*Fudge, supra*, 7 Cal.4th at p. 1108.) Moreover, any possible judicial bias that might be inferable was dispelled by the instruction that the jury should not consider anything the court said as indicative of its beliefs. The jury is presumed to have understood and adhered to this instruction. (See, e.g., *People v. Holt* (1997) 15 Cal.4th 619, 662.)

Additionally, on the merits, appellant's claim fails. Directing the jury to consider whether a witness' identification was corroborated by other evidence is not argumentative, namely of such a character as would invite the jury to draw inferences favorable to one party over another from particular evidence. (*People v. Hines* (1997) 15 Cal.4th 997, 1067-1068; *People v. Wright* (1988) 45 Cal.3d 1126, 1135.) Rather, this directive simply serves to focus the jury's attention on a neutral factor relevant to the determination of reasonable doubt and does not address the impact of such factor nor imply or invite any particular conclusions be drawn. (*Wright, supra*, at pp. 1137, 1141.)

13. *Court Security Fee Not Violative of Ex Post Facto Prohibition*

At sentencing, the trial court ordered appellant to pay a $20 court security fee. A $20 court security fee must be imposed for each criminal conviction. (§1465.8, subd. (a)(1.) This statutory provision "became operative on August 17,

2003." (*People v. Alford* (2007) 42 Cal.4th 749, 753 (Alford.) Appellant murdered Morales and Downey in 1999.

Appellant contends that imposition of the $20 court security fee violated the constitutional prohibition against ex post facto laws (U.S. Const., art. I, §10; Cal. Const., art. I, §9), because his crimes were committed prior to its operative date. No ex post facto violation exists.

In *Alford*, our Supreme Court addressed "whether the fee is subject to section 3's general prohibition against retroactive application of a newly enacted law, and whether imposition of the fee for a crime committed before the effective date of the statute violates state and federal prohibitions against ex post facto laws." (*Alford, supra,* 42 Cal.4th at p. 752. The court held: "[S]ection 3 is not implicated and . . . the fee does not violate the prohibition against ex post facto laws." (*Ibid*.) *Alford* therefore definitively resolves appellant's ex post facto violation claim adversely to his position.

14. *$20 Court Security Fee on Both Convictions Warranted*

The trial court imposed a single $20 court security fee. As the People and appellant acknowledge, this resulted in an unauthorized sentence that may be addressed in the first instance by this court. (See, e.g., *People v. Turner* (2002) 96 Cal.App.4th 1409, 1413; *People v. Terrell* (1999) 69 Cal.App.4th 1246, 1255.)

The parties further acknowledge the aggregate fee amount should be $40, or $20 for each of appellant's conviction. We therefore modify the judgment to reflect a total court security fee of $40.00.

15. *Cumulative Effect of Assigned Errors De Minimis*

Contrary to appellant's claim, the cumulative effect of the established errors is minimal, and thus, reversal of the judgment is not warranted. (See, e.g., *People v. Montiel* (1993) 5 Cal.4th 877, 944 [relatively few number of errors although "not trivial, their significance to the actual fairness of defendant's trial was minimal"]; *People v. Frank* (1990) 51 Cal.3d 718, 736 ["cumulative effect of the

few . . . errors too slight to warrant reversal for the penalty judgment"].)

16. *No In Camera Review of Sealed Records Indicated*

Appellant asserts this court must conduct an in camera review of sealed records to determine whether the trial court erred in denying his *Pitchess* motion. (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531.) We disagree. To trigger such review, it was incumbent on appellant, at a minimum, to demonstrate the need therefor, which burden he has failed to carry. (See *People v. Mooc* (2001) 26 Cal.4th 1216, 1226.)

Prior to severance of appellant's trial, a co-defendant filed a motion, joined by all defendants, for discovery of the personnel records of Detective Teague on "Teague's character for honesty and veracity."[10] An objection was made that the motion was legally insufficient, because defense failed to meet its burden. The prosecutor, however, acknowledged the availability of two Teague files that "could be considered [discoverable] under *Brady*[*v. Maryland* (1963) 373 U.S. 83]"and suggested an in camera review of these files by the trial court. Co-defendant's counsel conceded the motion was not a traditional *Pitchess* motion in that other than arresting and in interviewing co-defendant, no direct contact between Teague and co-defendant took place. Counsel argued his declaration, however, provided "a plausible scenario" explaining why Teague's credibility was in issue. The prosecutor did not agree Teague would testify.

In denying the *Pitchess* motion, the trial court found the requisite specific factual scenario was lacking and that nothing was said about Teague lying in this case "or anything else." Although the court stated it would review the prosecutor's materials in camera on the *Brady* issue, the court would not require anything be turned over at that juncture in view of the possibility Teague might

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10 This motion is not part of the record, nor has appellant requested the record be augmented with the motion.

never be called as a witness.

Initially, we conclude no review of the sealed records is warranted, because Teague did not in fact testify in appellant's separate trial. Also, there is nothing for this court to review to determine whether the trial court abused its discretion in not turning over the files to appellant inasmuch as the trial court did not itself review these files. (Cf. *People v. Mooc, supra*, 26 Cal.4th 1216, 1226, 1228, 1230-1232 [in determining abuse of discretion issue, appellate court may review law enforcement personnel records].)

17. *In Camera Review of Sealed Transcript Not Compelled*

Appellant contends this court should conduct its own in camera review of the sealed transcript regarding certain county jail materials in order to determine whether the trial court erred in finding those materials were not germane to his subpoena. We decline his invitation and find his contention untenable.

At trial, defense counsel subpoenaed "any and all kites intercepted or reports generated"[11] referring to appellant "containing any and all gang references good or bad having to do with any or all gang activity prison gang activity, etcetera" for the purpose of showing appellant was not engaging in Mexican Mafia business or ordering "hits on people, green lights." After its in camera review of the materials supplied pursuant to the subpoena, the court ordered a sealed transcript prepared.

The trial court ruled there was nothing exculpatory or anything directly relevant to the subpoena. The court added: "Again, I will have to listen to the testimony to see if anything changes my mind, and I am going to seal up the documents that I have, and we will go from there. So at this time I find that . . . [a]fter reviewing them, they are not relevant, and the documents will be

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[11] Defense counsel describe "kites" as "sort of mail between prisoners and communication between prisoners."

sealed."

Appellant cites no applicable authority directing this court to conduct its own review of the documents in question. Rather, he simply relies on the in camera procedures applicable in the *Pitchess* context, which is legally and factually wholly unrelated. We therefore find his position unsuccessful. (See, e. g., *People v. Taylor* (2004) 119 Cal.App.4th 628, 643 ["A legal proposition asserted without apposite authority necessarily fails"].)

DISPOSITION

The judgment is modified to reflect the imposition of a $20 court security fee for each of appellant's two convictions in the total amount of $40. As modified, the judgment is affirmed. The superior court is directed to prepare an amended abstract of judgment accordingly.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COOPER, P. J.

I concur:

FLIER, J.

PEOPLE v. JAVIER MARQUEZ – B193733

RUBIN, J. – Concurring

I concur in the judgment. Although, I agree with much of the reasoning of the majority and agree that the judgment should be affirmed as modified, I write separately. Specifically, I conclude that any violations of the rule in *Crawford v. Washington* (2004) 541 U.S. 36 or of California's hearsay statutes as discussed in parts 1 and 2(a) were undoubtedly harmless and therefore much of the discussion in those two sections is unnecessary.

RUBIN, J.